Halbig v. Burwell – Stopping the Imperial Presidency

When the Executive Branch is confronted by language in a statute that is contradictory to its own policy objective for the overall statute, should the Executive Branch have the authority to rewrite the language through interpretation, or should the Executive Branch be required to go back to Congress and ask that the language be changed? That is the fundamental issue in the "tax credits in federal exchanges" cases now working their way through the Courts. There are currently four lawsuits challenging the Administration's unilateral action. *Those cases are:* Pruitt v. Burwell, Halbig v. Burwell, King v. Burwell, *and* Indiana v. IRS. The District Court of Appeals decision in *Halbig* is expected to come soon.

The Facts:
The Affordable Care Act creates a system for providing tax credits for certain individuals to purchase health insurance. The eligibility for the tax credits depend upon:

- The individual's income (must be between 100% and 400% of poverty);
- The individual not having an offer of minimal essential coverage from another source, most notably employer sponsored coverage and Medicaid; and
- The individual must purchase insurance through an Exchange **"established by a state."**

The plain language of the statute makes tax credits available to only those individuals who enroll in an "**Exchange established by the State."**

> *IRC, 36B(b)(2)(A) (As added by 1401 of the ACA) -- Refundable credit for coverage under a qualified health plan*
>
> the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent (as defined in section 152) of the taxpayer **and which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act. [emphasis added]**
>
> *ACA 1311 (b) AMERICAN HEALTH BENEFIT EXCHANGES*
>
> Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an ''Exchange'')

The law passed in March 2010 and at that point, people had an opportunity to read the bill. As then-Speaker Pelosi predicted, people began to "find out what is in it." What Speaker Pelosi did not predict, however, was that the people did not like what they found out. In the 2010 elections, Republicans took the majority in the House of Representatives, picking up more seats than in any congressional election since 1948.

The states also had an opportunity to read what was in the bill, and many didn't like it either. Many governors and/or state legislatures decided not to expand Medicaid, and nearly two-thirds decided against establishing state-based Exchanges. Embracing ObamaCare was unpopular, so many states stayed away from it. But states had another reason to not establish a state-based exchange: **Attracting jobs to their state**. The employer mandate penalties are triggered if an employee goes into an exchange and receives a premium tax credit. If an employer does not offer coverage, but no employee ever receives a tax credit, the employer is not penalized.

A state, reading the plain language of the statute that tax credits are only available in state-based Exchanges could make the logical conclusion that to attract jobs to their state, they would not establish an Exchange, and thereby have a more friendly business environment and attract more jobs to the state versus other states that did establish Exchanges.

Ultimately, 36 states chose not to establish an Exchange. This was an inconvenient development for the Obama Administration for several reasons and led in part to the failed launch of healthcare.gov. But for the Obama Administration, the decision by two-thirds of the states not to "establish" Exchanges also meant that tax credits would not be available to millions of Americans who reside in those states. This was not the public policy objective the Administration anticipated or favored. The Obama Administration clearly wanted all otherwise eligible Americans to receive tax credits, regardless of where they lived.

In May 2012, Treasury and IRS issued final regulations that state, "The statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange." With that declaratory statement – and nothing else to explain the odd conclusion – the Administration by Executive action made tax credits available in all states, regardless of whether the state had made the affirmative choice to establish an Exchange. The Administration also made large employers in all 50 states (and DC) subject to the employer mandate.

Separation of Powers

There is no doubt that if the Administration came back to Congress and said, "the language of the statute is inconsistent with our objectives and we want it changed" that it would meet resistance. Many Members of Congress elected since the passage of the ACA were elected specifically because they opposed the law. At the very least, the Administration would be forced to compromise – as would Congress if it wanted other changes to the law that the Administration opposed. It would be messy, contentious, divisive and perhaps lengthy. But that is exactly what the Founders envisioned in setting up our system of government with popular elections and the separation of powers.

The Administration does not have – nor should it seek to have – the power to override statutory language it finds inconvenient. Some have argued the language "established by a state" was a drafting error. Perhaps it was – the ACA was sloppily-drafted and rushed through under extraordinary circumstances and procedures. But so what? As the Galen Institute wrote in their Amicus Brief in the Halbig case, "Because the tax credit for individual insurance has major political and economic ramifications … Congress should not be presumed to have 'delegate[d] a decision of such economic and political significance to an agency in so cryptic a fashion.' See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)."

The aggressive unilateralism practiced by President Obama presents a challenge to the constitutional balance of powers. If this president can get away with making his own laws, future presidents will have the ability to do it as well. No president should have the power to make laws on his or her own.